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It's All *in the* Name

OMBUDSMAN REPORT

André Marin • Ombudsman of Ontario • August 2006

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Ombudsman Report

Investigation into complaint of the Family Responsibility Office's ineffective enforcement using a Writ of Seizure and Sale

"It's All in the Name"

André Marin
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Overview

1 The Family Responsibility Office dropped the ball. Its practices have cost the complainant at least $2,422.00. He should be compensated for his loss, and systems should be put in place to prevent this from happening again. Indeed, the government and the current administrators of the Family Responsibility Office need to step back and rethink the kind of responsibilities the *Family Responsibility and Support Arrears Enforcement Act, 1996* imposes. It is a regime meant to serve a dependent public and the government has to administer it with the utmost good faith and in the best interests of those who depend on it for their support payments. In this case at least, that insight has been missing in action.

2 The Family Responsibility Office wields tremendous power. All court awarded support orders must be filed with that Office and once filed, the Family Responsibility Office has exclusive jurisdiction to enforce those orders. In other words, the "support recipient," the party entitled to support, loses the ability to control payment and becomes dependent on the Family Responsibility Office to protect his or her interests. The statute creates a classic power/dependency relationship. Rights are removed from the citizen so that they can be more effectively administered by a government agency in the citizen's best interests, and the citizen is left utterly dependent on wise, good faith assistance. That is not what the complainant in this case (we will call him Mr. F to protect his privacy) received. Unless there is a change in insight, this is not what other similarly situated individuals will receive.

3 By the fall of 2003, Mr. F was owed more than $5,000.00 from his former spouse as a result of her defaulting on the terms of a court ordered child support order. As the legislation anticipated, he turned to the Family Responsibility Office for help after he learned that his former spouse was selling her home and was likely to pocket the proceeds for herself. He advised the Family Responsibility Office that this sale was imminent, just as they had advised him to do. The Family Responsibility Office assured him that it had used its power to obtain a Writ of Seizure and Sale that would ensure that any equity derived from the sale would be used to retire the defaulted support payments. Its efforts failed, however, because the Writ of Seizure and Sale was placed in the payor's former married name, but she had registered the home under her new married name.

4 At the time Mr. F contacted the Family Responsibility Office to alert it of the imminent sale of the payor's property, that Office knew of three relevant things. First, it was well aware that a Writ of Seizure and Sale would be ineffective unless it matched the name used by the support payor in the property title documents. Second, it knew that Mr. F's former spouse was in the practice of using different names. Third, it "knew" that it could not record the Writ of Seizure and Sale in a name other than the name on the support order unless Mr. F obtained a variation of the support order to reflect her registered name. Yet the Family Responsibility Office never told Mr. F about the potential need for that variation. It simply filed a Writ that based on information in its possession it should have known would likely be ineffective. And then it told Mr. F that the Writ of Seizure and Sale had been taken care of.

5 The Family Responsibility Office's failure to warn Mr. F cost him money. The Family Responsibility Office should make this good. Instead, when we approached the Acting Executive Director and the Deputy Minister of the Ministry of Community and Social Services to remedy the situation, we were met with an unflattering and unpersuasive attempt to deny responsibility. What we received were excuses.

6 First, we were told that procedures and policies had been followed. In my opinion it is an unseemly refuge for an organization, statutorily obliged to enforce support orders effectively, to justify its failure to do so by responding that it has followed its own ineffective procedures and policies.

7 Second, the Acting Executive Director justified not telling Mr. F that he would need a variation because Mr. F would probably have run into problems if he had tried to get the support order fixed. With respect, that kind of thinking is as mysterious as it is unconvincing. Arm the man with the information he needs to try – do not give up on his behalf without telling him.

8 Third, we were told by the Acting Executive Director that the Family Responsibility Office could not tell Mr. F about the need for a variation of the support order if the property was registered by the former spouse in a new name because the Family Responsibility Office cannot give legal advice. This is, with respect, either an unconvincing error of perspective or, as I say, a simple excuse. It is obvious that we are not talking about legal advice, but rather legal information of the kind the Family Responsibility Office habitually provides.

9 Fourth, I was also told that the *Freedom of Information and Protection of Privacy Act* would prevent the Family Responsibility Office from advising a support recipient that the payor had changed their name. In fact, when it comes to disclosing personal information to permit effective enforcement of support orders I do not believe the *Freedom of Information and Protection of Privacy Act* applies. There is, however, room for some controversy about that. The key point is that even if that act does apply, it can furnish no excuse for not advising Mr. F, given that he was the one who told the Family Responsibility Office about his former spouse's new names.

10 Finally, I was told that the Family Responsibility Office has no obligation to tell support recipients about the need for the Writ of Seizure and Sale to match the registered name, and that support recipients should effectively fend for themselves. It is this that bothers me most because it reflects a lack of insight into the responsibility that the Family Responsibility Office has assumed. Simply put, it is a wrong ethic for a government agency to remove rights of enforcement from a citizen and to purport to take care of those rights on the citizen's behalf, only to then disclaim responsibility for doing what it can to fully protect those rights it has removed. The Family Responsibility Office owes, in my opinion, a duty of good faith and effective representation to those whose support entitlements it controls. No responsibility to tell the support recipient what needs to be done to make enforcement effective? It is evident to me that a cultural change is required in the way that the present administration views its role. The unfairness is palpable.

11 Sadly, this case reflects the very malaise I have been attacking these many months. Administrators have taken a wooden view of their rules and obligations and forgotten that they are dealing with real people. Mr. F is a person, not a case, and he is justifiably frustrated. My hope is that the way the Family Responsibility Office and the Ministry of Community and Social Services responds to this Report will restore some of his faith, and a good deal of fairness.

Complaint

12 Mr. F is a divorced father who has custody of his son. His personal financial situation is such that his former spouse is responsible for contributing to child support. He complained to my Office, claiming that his former spouse managed to sell her home and to keep the proceeds, which should have been used to repay her defaulting child support payments. This happened because the Writ of Seizure and Sale filed by the Family Responsibility Office was not issued in the same

name that his former spouse had registered her property in. The response he received from the Family Responsibility Office was "there is nothing we can do about it now."

13 Mr. F said that the Family Responsibility Office had been aware all along that his former spouse was using different names than appeared on the court order for support. He advised that although he warned the Family Responsibility Office of the sale of the property, he was reassured that the Writ had been filed and that everything was taken care of. The Family Responsibility Office did not inform him that if the payor's name on the Writ of Seizure and Sale was not the same as the one that she had registered on the title to her property, the Writ could not be enforced. In the end he was left frustrated and without remedy.

Investigative Process

14 Mr. F's claims were proven to be true. During the investigation we reviewed the Family Responsibility Office's hard copy file for Mr. F's case as well as account records and relevant computer records. The computer records include a case log in which Family Responsibility Office staff record telephone calls and correspondence sent and received in each case. We also reviewed the Family Responsibility Office's policies and procedures, website information and enabling legislation, and discussed the complainant's case with Family Responsibility Office staff.

Overview of the Family Responsibility Office

15 To fully understand the implications of what we found during the investigation, it is important to take a modest detour and set out the nature and role of the Family Responsibility Office.

16 The Family Responsibility Office is a creature of statute, established by the *Family Responsibility and Support Arrears Enforcement Act, 1996*. The purpose of that statute and its amendments and the creation of the Family Responsibility Office are evident - there has long been a problem with the effective enforcement of support orders in Ontario. This is a serious problem because "support recipients," those entitled under support orders, often depend on support payments for their financial well-being and the support of their custodial children. The Province of Ontario responded to the problem of defaulting "payors" in a laudable way. It developed effective tools for enforcing support payments, and went even further. It took the responsibility of enforcing support orders onto its own

shoulders, assigning that role to the Director of the Family Responsibility Office. Subsection 5(1) of the *Family Responsibility and Support Arrears Enforcement Act, 1996* imposes the "duty" on the Director to enforce court orders for support or maintenance and domestic contracts or paternity agreements that are filed with the court and the Director's office. As the Ontario Government's Family Responsibility Office website recognizes, "The Family Responsibility Office (FRO) is [now] responsible for enforcing court orders for child and spousal support [and] separation agreements and domestic contracts that are filed with Ontario Courts." This applies to many support arrangements in this province. According to subsections 9(1) and 12(1) of the *Family Responsibility and Support Arrears Enforcement Act, 1996* every support order issued in Ontario is to provide for enforcement by the Director, and the Court clerk or registrar is to file the order. A largely comprehensive program for enforcement is thereby established.

17 Once a support order is filed, two relevant things happen. First, the *Act* gives the Director the tools needed to obtain the money where recovery is possible. The *Act* has myriad provisions ensuring that the Director has the information needed for enforcement. Under section 19, the parties to the order, the "payor" and "support recipient," are obliged by law to update the Family Responsibility Office of any change in address or contact information. There is also provision in section 54 for the Director to demand any other "enforcement related information" or "recipient information" from other parties, including employment, income, asset, and contact information. Subsection 61(1) obliges the Director to "collect, disclose and use personal information about an identifiable individual for the purpose of enforcing a support order." Then the *Act* provides a raft of enforcement mechanisms, including serving notice of support deduction orders on income sources to garnish income, suspensions of licenses, and liens and Writs of Seizure and Sale to permit a payor's property to be used to repay support debts owed. Offences are also created to assist in compelling payment, and they include the possibility of incarcerating defaulting or dead-beat payors.

18 In addition to empowering the Family Responsibility Office in this way the *Act* does something else that is of tremendous relevance in the instant case. It removes the right that the individual support recipient would otherwise have to enforce payment of the obligation he or she is owed. Subsection 6(7) provides that "no person other than the Director shall enforce a support order that is filed in the Director's Office."

19 It is evident that the general nature of the relationship between parties to support orders and the Family Responsibility Office created by this regime is one of power and dependency. The Family Responsibility Office has the legal duty to enforce support arrangements, the discretion to use a range of tools to do so, and

imposing powers. Meanwhile the "support recipients" who often rely on that support for their financial wellbeing or for the wellbeing of their custodial children, have their enforcement rights and interests left entirely in the hands of that Office. This is a classic fiduciary relationship, in which the Government, by assuming the role it has through the Family Responsibility Office, is obliged whether by law or simple notions of fairness to use its powers in good faith, with appropriate standards of care, and in the best interests of those lawfully entitled to support.

The Facts Found

20 Mr. F's first court order for support from his former spouse was issued on September 3, 2002. That order was subsequently varied on April 15, 2004. Both orders were secured against his former spouse, using the name she went by when they were married. In keeping with the law in Ontario, those orders were filed with the Family Responsibility Office which assumed exclusive power over their enforcement. Mr. F was, from the date of the original order, in the Family Responsibility Office's hands to ensure support obligations owed by his former spouse were being honoured.

21 Mr. F's former spouse immediately fell into default under the original order, putting him at the mercy of the Family Responsibility Office. In fact, by the fall of 2003 more than $5,000.00 was owed. As a result, the Family Responsibility Office elected to obtain a Writ of Seizure and Sale against property owned by his former spouse. The function of the Writ of Seizure and Sale is to bind the payor's goods and lands situated within the area in which it is filed. The objective in filing the Writ was to encumber the payor's property with the Writ so that if and when it was sold the proceeds of sale could be grabbed to repay support arrears.

22 To the knowledge of the Family Responsibility Office, Writs of Seizure and Sale are in fact useless in enforcing payment against real property unless the name on the Writ essentially matches the name on the registered property. By the time the Family Responsibility Office secured the Writ of Seizure and Sale in November 2003 using the name that appeared on the court support orders it was aware that Mr. F's former spouse was using an array of names. To their knowledge she had variously used her new married name, as well as other names. In particular, the Family Responsibility Office records contain an undated Support Filing Form received by that Office on February 17, 2003 that gives her new married name rather than the name she used when married to Mr. F. On February 19, 2003 the Family Responsibility Office knew enough not to rely exclusively on the name on the court support order, when it referred to her as "Ms. F, a.k.a Ms. C" in a demand for information it made to a corporation. Indeed, in an October 21, 2003

letter to the Family Responsibility Office, Mr. F's former spouse referred to herself as Ms. F-C. When the Writ of Seizure and Sale was secured the Family Responsibility Office simply used the name found in the court order.

23 This was the easy thing to do. The Family Responsibility Office advised my Office that a court will not issue a Writ of Seizure and Sale unless the name on the Writ is identical to the court order for support. In spite of extensive powers it has under the *Act* to acquire information relevant to enforcement, however, at no time did it take any steps to determine whether a Writ of Seizure and Sale in that name would be of any use – it did nothing to find out whether the property owned by Mr. F's former spouse was registered in a matching name. Nor did it advise Mr. F that the Writ would not be enforceable unless the names matched. In fact the names did not match. Mr. F's former spouse had registered her property in her new married name.

24 The fact that a name on title does not match the name in the support order makes the use of a Writ of Seizure and Sale difficult, but not impossible. A support recipient can get a variation of the support order to refer to the payor's registered name, and then secure an effective Writ of Seizure and Sale, but the Family Responsibility Office failed to tell Mr. F about this. It simply secured a Writ that proved to be useless.

25 On April 11, 2005 Mr. F, whose support payments were still in serious arrears, contacted the Family Responsibility Office to alert them that he had learned his former spouse was actively selling her home. He wanted to make sure that his former spouse could not sell the house and keep the proceeds without paying her arrears. He was so intent on preventing this that he sought the support of his Member of Provincial Parliament (MPP) to follow up on his contact. On June 6, 2005 his MPP inquired on his behalf to ensure that a Writ of Seizure and Sale was in place: the Family Responsibility Office case log entry states, "confirmed we have one in place." No discussion was had about what it would take to ensure that the Writ would be effective.

26 One week later the MPP's office again contacted the Family Responsibility Office to advise them that Mr. F had heard the property had sold. The Family Responsibility Office again assured that there was a Writ of Seizure and Sale in place. On June 22, 2005 the MPP's Office learned from the Land Registry Office that in fact there was no Writ of Seizure and Sale on record from the Family Responsibility Office registered against the name in which the payor's property was held. An entry made by a Family Responsibility Office staff member dated July 4, 2005 indicates that the MPP's office had made a specific request to have the Writ filed "under [the payor's] maiden name," apparently believing this was the name which was registered on the title to the property. A July 6, 2005 entry by

another Family Responsibility Office staff member, headed "review of notes," stated that a Writ couldn't be issued in the payor's maiden name.

27 In fact, this last flurry of activity was too little, too late. Our investigation confirmed that the house did in fact sell on June 11, 2005. There was approximately $20,000.00 in equity available at the time for seizure. According to the Acting Executive Director of the Family Responsibility Office the actual enforceable support amount that could have been recovered had the Writ been effective would have been $2,422.00. Mr. F's spouse walked away with it and the arrears have still not been paid.

Analysis

28 It is my opinion that the way the Family Responsibility Office acted in this case was unreasonable. In particular, it was unreasonable for the Family Responsibility Office to ignore its knowledge that Mr. F's former wife had been using different names than the one used in the initial support order when it secured a Writ of Seizure and Sale using her former married name. The Family Responsibility Office should have tried to identify whether a Writ of Seizure and Sale in her former married name would be effective, rather than simply taking one out without inquiry or investigation. It was also unreasonable for the Family Responsibility Office not to have advised Mr. F that if his former spouse had registered her property in a name other than the one appearing in the support order that he would have to get a variation of that order before an effective Writ of Seizure and Sale could be secured. While supposedly protecting his rights, it had knowledge he did not and that he required yet it failed to share it with him. And it was careless for the Family Responsibility Office simply to have reassured him and his MPP when they were attempting to secure proceeds of sale to retire his former spouse's support arrears that a Writ of Seizure and Sale was in place when the Family Responsibility Office had reason to believe that the Writ might be ineffective. This gave Mr. F false hope and induced him to remain passive rather than to attempt to secure the required variation. Finally, the responses my Office received when we approached the Acting Executive Director and then when we met with the Deputy Minister of the Ministry of Community and Social Services were disappointing. In particular, we were met with five offered explanations:

- that the Family Responsibility Office acted in accordance with its policies and procedures;
- that there is no point in advising support recipients about obtaining required variations in court orders to facilitate Writs of Seizure and Sale because it is costly and time consuming;

- that advising support recipients how to respond where a support recipient's property is registered in a name different from that included in a support order would be an improper act of giving support recipients legal advice;
- that the *Freedom of Information and Protection of Privacy Act* prevents the Family Responsibility Office from sharing information about names being used by the payor; and
- that there is no obligation on the Family Responsibility Office to assist support recipients in this way.

29 In fact, these are not, in my opinion, explanations. They are unreasonable excuses that underscore the need for remedy and change.

Complying with Policies and Procedures

30 In response to my Office's notice of investigation, the Executive Director of the Family Responsibility Office stated that the Writ in Mr. F's case had been filed in accordance with the Family Responsibility Office's policy and procedure and that information provided to him had been consistent with the Family Responsibility Office's business practices. When I issued my initial Preliminary Report and recommendations on January 20, 2006 a similar response was given. We were told that the Family Responsibility Office had fulfilled its obligations by ensuring that the Writ was issued using the payor's name as it appeared in the support orders, including the April 2004 variation. The Acting Executive Director observed that it had been filed in the correct jurisdiction, with respect to the correct property and in a timely manner.

31 It is, of course, important for government agencies to follow their policies and procedures. The failure to do so may itself be grounds for complaint. On the other hand where policies and procedures are ineffective or ill-designed the mantra "we were following policies and procedures" is not an explanation. It is an evasion. It is obvious that the legislation provided the Family Responsibility Office with the power to use Writs of Seizure and Sale as an effective remedy for collecting arrears. It is simply not in keeping with that objective, or with the overall responsibility of the Director to enforce support orders, to operate using policies and procedures that are infirm. So what if an ineffective Writ was filed in the correct jurisdiction, with respect to the correct property and in a timely manner? It proved to be a waste of paper. Policies and procedures failed to provide steps for attempting to secure effective Writs of Seizure and Sale in cases where payors may be registering their property using different names than those found in a support order. It is no answer to Mr. F's complaint that ineffective policies and procedures were followed.

The Futility Explanation

32 In response to my Notice of Investigation the Executive Director said that the Family Responsibility Office does not advise support recipients of the possibility of varying support orders to reflect the name the payor is using to register title because it is unlikely the support recipient would get the required variation. She commented:

> It is not the practice of my office to advise clients of this possibility because obtaining a court order is both costly and time consuming for the client, with only a very limited possibility of a positive result. At the time when a recipient becomes aware of the payor's attempt to sell a property, the sale of the property usually occurs much more quickly than a new court order can be obtained. In addition, if a new court order is obtained with the payor's various names in the style of cause, the recipient could discover after the fact that the title of the property is in the name of a third party.... In the event, the effort and cost incurred by the recipient in obtaining the new order would have been for naught.

33 The same basic point was made when my staff met with the Acting Executive Director and the Deputy Minister of the Ministry of Community and Social Services on April 7, 2006.

34 With respect, I find this "no point" thinking to be not only unpersuasive, but wrong as a general proposition. In some, perhaps even most, cases it may prove right that variation orders are too costly and time consuming to present a realistic solution. It has to be remembered, however, that the *Family Responsibility and Support Arrears Enforcement Act, 1996* removes from relevant support recipients the right to take enforcement action. They are entirely dependent on the Family Responsibility Office to act in their best interests – not to assume a defeatist attitude in all cases. Support recipients are entitled to make informed choices about whether or not to rectify the situation and improve their chances of securing arrears owed. After all, the cost of seeking variation orders is not to be borne by the Family Responsibility Office, and neither is the cost of doing nothing. Support recipients should be presented with the facts and permitted to make their own decisions about whether to do what may be required to keep the Writ of Seizure and Sale enforcement option open. The Family Responsibility Office should not simply assume that there is likely no point and thereby not bother to even mention the problem and its potential solution.

35 It is paradoxical, in my opinion, that at the same time that we were being told that the Family Responsibility Office feels it appropriate to assume it knows best on this issue and can decide for support recipients that it is not worth their while seeking a solution, we were also told by the Deputy Minister that there is an onus on individual support recipients to find out information and make themselves aware. It cannot be both ways. The Family Responsibility Office cannot at once be patronizing enough to waive potential solutions for support recipients without seeking their input, yet at the same time expect support recipients to fend for themselves.

36 The fact is that the Family Responsibility Office operates vis-à-vis support recipients in a power/dependency role. It should recognize its obligation, given its monopoly on enforcement, to share information it has about what support recipients can do to try to maximize their prospects of recovery. It is not for the Family Responsibility Office to paternalistically and fatalistically prejudge the matter.

37 The impropriety of this "no point" thinking is laid bare, in my opinion, in this particular case. First, for more than a year before the sale occurred, the Family Responsibility Office was aware that Mr. F's former spouse was using names different from the one in the support orders. Had it shared its knowledge with Mr. F of the limitations on using Writs of Seizure and Sale to secure arrears, he would have had more than a year to do what was required. The "time" objection rings hollow.

38 Second, Mr. F does not project the attitude of resignation reflected in the Family Responsibility Office; there is every indication he would have taken the steps needed to ensure collection because he had taken all reasonable steps he could to galvanize the Family Responsibility Office into effective action. He even co-opted the assistance of his MPP to ensure that the Family Responsibility Office was aware both that his former spouse used different names and that her property was for sale. He repeatedly sought assurances that a Writ was in place so that he could obtain satisfaction of at least some of the significant child support arrears that had accumulated. Yet at no time was he given the information needed to try to do his part to ensure that this could be accomplished.

39 Finally, it cannot be forgotten that the Family Responsibility Office not only failed to alert him to the problem and its solution, it even assured him that a Writ of Seizure and Sale was in place with the obvious implication being "it has been taken care of." He relied upon that assurance and sat back waiting for the sale to yield the arrears. Without question he detrimentally relied on what he was told. It does not now lie in the mouth of the Family Responsibility Office to say, "Well, he probably could not have secured an amendment to the order anyway." Had he

been told, tried and failed, that kind of answer would have been tenable in his particular case. As it stands, it is not.

The Legal Advice Prohibition Explanation

40 When I advised the Acting Executive Director in my initial Preliminary Report that I was thinking of recommending that the Family Responsibility Office should take all reasonable steps to give support recipients the required information to deal with situations in which a payor uses different names I was told that this would involve the Family Responsibility Office inappropriately in providing legal advice. She responded:

> The FRO, as a neutral maintenance enforcement program enforcing support orders in Ontario, is unable to provide legal advice to either a support payor or a support recipient... The Director's Office is not in a solicitor and client relationship with the support recipient and is unable to provide legal advice to a support recipient concerning the legal arguments to be made, and the statutory authority on which basis a changed or varied support order could be made.

41 It has been my experience that this kind of "legal advice" excuse is too readily used by those who administer government programs to justify withholding information about their own powers, policies and limitations. It is particularly galling to see this happen in the Family Responsibility Office context. After all, the right to enforce support orders has been taken away from the recipient and given to the Family Responsibility Office, which has been furnished with essentially a monopoly authority to use the Writ of Seizure and Sale tool. Even if it could fairly be styled as legal advice, the Family Responsibility Office should share with support recipients, who are dependent on that Office for the effective enforcement of custody orders, information that the support recipient requires to make that tool effective. This is obviously within the contemplation of the *Family Responsibility and Support Arrears Enforcement Act, 1996.* It cannot be forgotten that the Family Responsibility Office has been given the statutory "duty to enforce support orders." That Office cannot discharge this duty without sharing requisite information with support recipients about what they need to do to enable the Family Responsibility Office to achieve effective enforcement.

42 In any event, it is a mischaracterization to style the kind of information we are speaking about as "legal advice." Surely it is not legal advice to advise support recipients about the circumstances required before a statutory tool held on their behalf by a Government agency charged with protecting their interests can be used effectively. More specifically, it is not "legal advice" to tell support

recipients that Writs of Seizure and Sale can issue only in names that appear in the support order and that where a payor's property is registered in a different name, a variation order can be secured. This is nothing more than generic information. The fact that it may inspire support recipients to seek legal advice on whether they should take this step does not make it legal advice. No-one is asking the Family Responsibility Office to recommend variations, or draft variation applications. It is a simple case of information sharing.

43 I am struck by two inconsistencies that serve to undermine the integrity of the "legal advice" explanation for keeping Mr. F and others like him in the dark. First, telling support recipients about the need for a variation before an effective Writ of Seizure and Sale can issue is not at all unlike other information that the Family Responsibility Office shares on its own website. For example:

> "If you disagree with the amount set out in your court order, you may have to go back to court. To change a domestic contract that is filed with the court, both the payor and recipient need to agree to that change." Ontario, Ministry of Community and Social Services website, 'Important Points to Remember,' www.mcss.gov.on.ca/mcss/english/pillars/family Responsibility/ (last accessed 10/07/2006 at 12:42 p.m.)
>
> "If the payor and recipient disagree on when a responsibility to pay support ends, they may need to go back to court." Ontario, Ministry of Community and Social Services website, 'Important Points to Remember,' www.mcss.gov.on.ca/mcss/english/pillars/family Responsibility/ (last accessed 10/07/2006 at 12:42 p.m.)

44 What is the difference between that and:

> "If the payor holds title to property in a name different from that used in the support order, a variation of that support order to reflect the name in which the payor has taken title may be required before an effective Writ of Seizure and Sale can be obtained. To vary a support order recipients will need to go back to court."?

45 If telling payors and recipients what is required for an effective change to a domestic contract or what is needed to terminate support is not legal advice then neither is telling support recipients that they may need to go back to court to have effective access to Writs of Seizure and Sale.

46 The second inconsistency undermining the "legal advice" excuse is the resolution offer that the Acting Executive Director made in response to my initial Preliminary Report. She expressed a willingness to amend the Family

Responsibility Office's existing policies and procedures to facilitate advice where support recipients inquire specifically about the effectiveness of Writs of Seizure and Sale when the payor uses a name other than the one on the support order and the Writ. If advising particular inquiring support recipients is not impermissible legal advice, then why would advising recipients generally be?

47 As I say, the Family Responsibility Office has a legislative tool for enforcement and a monopoly right on its use and in some cases its effective use depends on actions being taken by support recipients. The Family Responsibility Office should tell those who depend on that tool when it is likely to be effective and when it will not be so that they can take their own advice on whether to respond. The "legal advice" explanation is either premised on a misperception about the difference between administrative information and providing legal counsel, or it is an empty excuse. In either case it provides no answer to Mr. F's complaint or to the feasibility of the policy changes I will be recommending.

The *Freedom of Information and Protection of Privacy Act* Explanation

48 In response to my initial Preliminary Report in a letter dated February 6, 2006, the Acting Executive Director referred to the fact that the Family Responsibility Office would be prohibited under the *Freedom of Information and Protection of Privacy Act* from disclosing to a support recipient that a support payor had changed his or her name, with the implication being that this would prevent the Family Responsibility Office from alerting support recipients of the need to secure variations of court orders.

49 It is my opinion that, properly interpreted, the *Freedom of Information and Protection of Privacy Act* does not in fact bar disclosure of a change in name or alternate name used by a payor to a support recipient where communicating the name is necessary to enable the enforcement of a support order using a Writ of Seizure and Sale.

50 First, section 54 of the *Family Responsibility and Support Arrears Enforcement Act, 1996* empowers the Director to demand enforcement-related information from anyone and to disclose it "to the extent necessary for the enforcement of the support order." That section "applies despite any other Act or regulation and despite any common law rule of confidentiality," in other words, in spite of the *Freedom of Information and Protection of Privacy Act*. While "enforcement related information" does not include expressly changes of name or alternate names used by a payor, those names must be included by implication. If the *Family Responsibility and Support Arrears Enforcement Act, 1996* is not read this

way then the Director would be without authority to require information as to whether the payor has changed his or her name, or is using another name. If section 54 is read in this way, it permits the Director to share information about the names used by a payor with the support recipient where doing so is necessary to use the Writ of Seizure and Sale effectively.

51 Second, section 55 permits the Director to secure information from the Government of Canada and to disclose it "to the extent necessary for the enforcement of the [support] order" *or* as permitted by the *Freedom of Information and Protection of Privacy Act*. In other words, if the Director finds out from a federal government source that the payor is using a different name, the *Freedom of Information and Protection of Privacy Act* does not prevent disclosure of that name if necessary for the enforcement of a support order.

52 Third, section 61 imposes a duty on the Director to collect, *disclose* and use personal information about an identifiable individual for the purpose of enforcing a support order. Subsection 61(3) expressly ousts the *Freedom of Information and Protection of Privacy Act* in the "collection of personal information." It is arguable that this phrase has to be read generally to include not only "collection" *per se*, but also "disclosure and use," otherwise section 61 would permit the Director to collect personal information but not use it.

53 While the drafting is not optimal, leaving room for some debate, what is apparent is that the framers of the *Family Responsibility and Support Arrears Enforcement Act, 1996* have gone to tremendous lengths to ensure that the *Freedom of Information and Protection of Privacy Act* does not frustrate the effective enforcement of support orders. Either the *Act* should be interpreted in keeping with this goal as permitting disclosure by the Director to a support recipient of a change in name by a payor where that disclosure is necessary to enable arrears to be collected [as in Mr. F's case], or the statute should be amended to permit this.

54 In any event, even if the *Family Responsibility and Support Arrears Enforcement Act, 1996* as currently drafted does not allow disclosure to a support recipient of a name used by a payor for enforcement purposes because of privacy considerations that would have no reasonable impact on instituting a general practice. In particular, it would have no effect on the recommendation I will be making below that support recipients generally should be advised that Writs of Seizure and Sale will not be effective to bind property unless registered in the name used by the payor to register their title to that property, and that variations of support orders are possible to counter this. Giving support recipients this general information does not require communicating specific names known to the Family Responsibility Office.

55 Nor would the *Freedom of Information and Protection of Privacy Act*, even if it applied, have any effect in a case like Mr. F's where he himself advised the Family Responsibility Office of names used by his former spouse.

56 In short, even if the *Freedom of Information and Protection of Privacy Act* does impose communication limits on the Family Responsibility Office, those limits do not justify failing to advise Mr. F about the ineffectiveness of the Writ of Seizure and Sale, or of the need for a variation of the support order, and those limits can have no impact on the adoption of the general communication policy I will be recommending.

The General Absence of An Obligation Explanation

57 What is most troubling about the way those who administer the *Family Responsibility and Support Arrears Enforcement Act, 1996* are dealing with Mr. F and how they are responding to my investigation is the general perspective they are exhibiting about their role under that statute. They have resisted the suggestion of any obligation on their part to have informed Mr. F or others like him of how to make Writs of Seizure and Sale effective. Indeed, as I have said, the Deputy Minister has suggested that there is an onus on individuals like Mr. F to find out information and make themselves aware of what they have to do, and that the Family Responsibility Office cannot be accountable for telling recipients everything. When I expressed my view that Mr. F should be compensated for the lost arrears I was told that this would be inappropriate because when the original support order was varied in 2004 he did not amend that order to reflect the names used by his former spouse. The implication was that somehow Mr. F should have been aware that this kind of amendment was required to make Writs of Seizure and Sale effective and that his failure to fix the problem was his own fault. In fact, while he was unaware of what needed to be done those in the Family Responsibility Office were fully aware. They could easily have guided him yet they claim the right to sit back and say nothing on the theory that individual citizens should take care of themselves. This is wrong-headed. It represents, in my view, a chronically impoverished and inaccurate notion of the ethical and legal relationship established by the legislation, and what that legislation necessarily entails.

58 As I have explained, in an effort to increase the efficiency of support collection the Government of Ontario has created the Family Responsibility Office and has given it the statutory responsibility of enforcing support payments. To facilitate this it has taken rights of enforcement away from support recipients. This requires support recipients to rely entirely on the Family Responsibility Office in order to enjoy their legal rights to support. It is obvious to me that this

power/dependency regime necessarily creates the kind of good faith, trust-like relationship that obligates the Family Responsibility Office to use its best efforts to advance the best interests of support recipients. This obligation necessarily entails sharing with support recipients the information that is required to permit effective enforcement. If support recipients, denuded of the power to enforce their support rights, need to bring variation applications in order to have effective access to Writs of Seizure and Sale they have to be told this by the body they depend on to protect their interest. It is simply not in keeping with either the good faith, trust-like ethic or the legal duties the *Act* creates to attempt to foist the onus on dependent support recipients to look after and inform themselves of things that are known to the Family Responsibility Office and that can easily be shared in the interests of the effective discharge by that Office of its Director's statutory duty to "enforce support orders."

59 I am not anxious to complicate matters or create distracting side issues but I was struck by the claim made to my Office on more than one occasion that the Family Responsibility Office is "a neutral maintenance enforcement program." It is not. An enforcement program is in its very essence not neutral. It exists to get money for support recipients. Not surprisingly, the *Family Responsibility and Support Arrears Enforcement Act, 1996* says nothing about neutrality. The representation that the *Act* requires neutrality is wrong. Indeed, the only relevant duty it imposes is the legal obligation on the Director to enforce support orders. While that must be done fairly in accordance with law, it is obvious that it is to be done in aid of support recipients, not to benefit payors. There is a danger that conceptualizing the Family Responsibility Office as having clients of equal obligation – support recipients and payors – presents the risk that the heavy and special power/dependency obligation owed to support recipients will be lost sight of as it has been here.

60 In the end, there is no need to resort to legal technicality to make the ultimate point. Simple instinct should do. The Family Responsibility Office had reason to know that the Writ of Seizure and Sale it had secured for Mr. F would be ineffective because it knew Mr. F's former spouse was using a variety of names. Yet it slapped that Writ of Seizure and Sale on without telling him there could be a problem and advising him of the means to potentially fix it. Then when Mr. F, left in a cloud of understandable ignorance, turned to them when he learned of an impending sale in order to ensure that the Writ was in place he was told inaccurately that it was OK. When he found out it was not OK he was told it is too late. Now that the Family Responsibility Office is being called to account for that it wants to reply, "we had no obligation to tell him – its his responsibility to inform himself." One does not have to be rehearsed in the law of government fiduciary obligations to know that this kind of attitude and behaviour is malodorous. Those who are responsible for administering this statute can do so

responsibly, fairly and reasonably only if they feel the full weight of the obligation that the Family Responsibility Office has assumed. They have to act in the best interests of support beneficiaries. This case suggests that this attitude is not yet ingrained.

Recommendations

Compensation

61 In accordance with subsection 21(1)(b) of the *Ombudsman Act* I find that the Family Responsibility Office's failure to provide information to the complainant about the risks that the current Writ might not be enforceable, and of his options for rectifying the situation, and its error in simply advising him directly and indirectly that a Writ of Seizure and Sale was in place were unreasonable.

62 The complainant was left to rely on the Family Responsibility Office to take effective measures to secure the support arrears owed him on behalf of his child. The Family Responsibility Office failed to do so and now that it is too late, cannot, in fairness, claim that notifying him of the need for a variation would have been pointless or ineffective. As a result of the ineffectiveness of the Writ of Seizure and Sale secured by the Family Responsibility Office $2,422.00 was not recovered when it could have been. In accordance with subsection 21(3)(g) of the *Ombudsman Act* I therefore recommend that:

1. **The Family Responsibility Office should pay compensation to the complainant in the amount of the arrears recoverable by the Family Responsibility Office at the time of the sale of the payor's property.**

Notification of Support Recipients

63 In accordance with subsection 21(1)(b) of the *Ombudsman Act* I also find the Family Responsibility Office's policy and practices to be unreasonable as they relate to securing Writs of Seizure and Sale. The Family Responsibility Office's position - that it does not advise support recipients that a Writ might not be enforceable if the payor changes names or registers property in another name - impedes the statutory obligation of the Director to enforce support orders. The potential for a change of name is not remote or unforeseeable given the prospects of remarriage. Nor is it remote in the case of female support payors, who may revert to their maiden names. In addition, support payors may use variations of their names. Indeed, my Office encountered another case in 2006 where a Writ

was issued in a name different than the name the payor registered his property in even though, as in this case, the Family Responsibility Office was aware that the payor used different names.

64 There are, in my view, two steps that should be taken. The first is general. There is no valid reason why the Family Responsibility Office cannot take reasonable steps to advise all support recipients that effective Writs of Seizure and Sale might not be secured unless the support order bears the name in which a payor holds title to property, and that if a payor does hold title in a name different from that found in the support order, that the support recipient would have to secure a variation of that support order to reflect the name of the payor that is on title. I am mindful that, in response to our initial Preliminary Report, the Family Responsibility Office has undertaken to share this kind of information when it receives specific inquiries but this undertaking is not, in my view, enough. Providing general access to this information even where no inquiries are forthcoming will reduce the need for support recipients to make specific inquiries and will increase the prospects that those support recipients who are ready and able to take appropriate steps to make Writs of Seizure and Sale effective can do so. This is a manageable notice requirement in spite of protests by the Family Responsibility Office and the Ministry of Community and Social Services to the contrary. It does not require that the Family Responsibility Office provide support recipients with information regarding every possible contingency that might affect the enforcement of a Writ. It simply requires that the Family Responsibility Office share general information about the effect of name changes on enforceability and the ameliorative efforts that are possible. I therefore recommend that:

2. **The Family Responsibility Office should take all reasonable steps to ensure that recipients are provided with information that a Writ of Seizure and Sale might not be enforceable if the payor changes their name or uses different names and that an amended Court Order reflecting the change in name or different names and a new writ may be required.**

65 There is a related, more specific, recommendation I would make. Where, as in the case of Mr. F and his former spouse, the Family Responsibility Office learns that a payor may be using a different name than the one recorded in the relevant support order, and where a Writ of Seizure and Sale is a viable method of enforcement, the support recipient should be notified of the name used by the payor. The duty I am recommending is in keeping with the obligation of good faith owed by the Family Responsibility Office to the support recipient and with the duty of the Director to enforce the support order effectively. I therefore recommend that:

3. **Where the Family Responsibility Office learns that a payor may be using a name different from the one recorded in a support order, and where a Writ of Seizure and Sale may be an appropriate method of enforcement, the Family Responsibility Office should advise the support recipient that the payor may be using a different name than the one recorded in the support order and that this could compromise the obtainment of an effective Writ of Seizure and Sale, and that an amended Court Order reflecting the name used by the payor and a new Writ may be required.**

Changes to Legislation

66 In my opinion, recommendations 2 and 3 provide a necessary but not a sufficient solution. There are changes to the *Family Responsibility and Support Arrears Enforcement Act, 1996* that can improve things dramatically.

67 First, while I think it to be implicit in the legislation, the *Family Responsibility and Support Arrears Enforcement Act, 1996* does not deal directly with changes of name or use of different names by payors. Section 19 of the *Act*, for example, requires a payor or recipient to file notice with the Director within 10 days of any change of home address, mailing address, telephone number, or "other contact information such as the payor's or recipient's work address, fax number or email address ..." Yet it does not address overtly whether there is an obligation on payors or recipients to notify the Director if a name is changed, or different names used, even though knowledge of a name is the most important way to identify and locate individuals. As described, section 54 gives the Director power to demand enforcement-related information from others, but the list of "enforcement-related information" includes "employer, place of employment, wages, salary or other income, assets or liabilities, home, work or mailing address or location, telephone number, fax number or e-mail address." Nowhere is "name" mentioned.

68 As I say, I think that access to names used by a payor is necessarily implied in each of these provisions in spite of the lack of overt reference; what is the point, for example, in calling someone's telephone number if you don't know who to ask for. It is obvious that current name and aliases are a critical form of "enforcement-related information." Access to information about the names used by a payor is therefore implicit in these provisions given their purpose. This is not however the apparent view of the Family Responsibility Office. We were advised that, in their view, the *Family Responsibility and Support Arrears Enforcement Act 1996* requires that payors and recipients inform the Family Responsibility Office of changes in address or telephone number but not a change in name. In spite of what they see as a legislative gap, the Family Responsibility Office nonetheless does ask recipients at the time they register their cases whether the support payor uses other names. But this is viewed as sound practice rather than legally compellable information. It is obvious that in the interest of effective enforcement, the *Family Responsibility and Support Arrears Enforcement Act, 1996* should therefore deal overtly with changes of name and aliases. Making this change would have two salutary results. First, it would remove any lingering doubt about whether that obligation exists. Second, if the change is made in all of the information gathering provisions of the *Act* it would incidentally authorize the Director, without any violation of the *Freedom of Information and Protection of Privacy Act,* to disclose to support recipients and others any change of name or alias used by the payor where that disclosure is necessary for the enforcement of the support order.

69 In accordance with subsection 21(1)(b), it is therefore my opinion that the Family Responsibility Office is acting "in accordance with a rule of law or provision of any Act that is or may be unreasonable." I am therefore recommending, in accordance with subsection 21(3)(e) that:

4. **The *Family Responsibility and Support Arrears Enforcement Act, 1996* be reconsidered with a view to imposing an express legal obligation on payors and support recipients to report any change in their name or use of name that varies from that contained in the registered support order, and an express right in the Director to secure this enforcement-related information from others.**

70 There is opportunity for one further legislative change that would enhance the enforcement regime. It will be recalled that the Family Responsibility Office justified not bothering to disclose the possibility of variation applications to accommodate effective Writs of Seizure and Sale because variation orders are so expensive and time-consuming to obtain that it is unrealistic in most cases for support recipients to bother. There is no reason why the process of securing effective Writs of Seizure and Sale should be that cumbersome and expensive

where payors register title in names that do not match the support documentation. While there is certainly a need to ensure effective public notice of encumbrances in land registration systems it is not necessary to require that this be done only by securing formal variations. Statutory declarations sworn by the support recipient or by Family Responsibility Office officers identifying a registered holder of a property interest as the payor in a support order, for example, could permit public notice of support claims while providing an efficient way of preventing delinquent or dead-beat support payors from defeating legislated enforcement schemes. Given the intricacy of property registration systems I will not make a specific recommendation on how a simpler notification system can operate and yet protect support recipients. I will therefore recommend, in accordance with subsection 21(3)(e), that:

5. **The *Family Responsibility and Support Arrears Enforcement Act 1996* and/ or the relevant land and property registration systems be amended to enable the efficient public registration of enforcement mechanisms for support obligations in cases where the support payor's property interest is registered under a name different from that contained in the support order.**

71 In the end, this investigation has proved once again to be a case of rule slavery and parsimonious interpretation. This is both disheartening and ironic given that the virtue in recognizing the kind of duty of utmost good faith that I am persuaded this legislation requires is that it puts people first. That is what the Family Responsibility Office should be doing – putting people first rather than refusing to share information that will protect the interests they hold in trust. The critically important regime the Family Responsibility Office administers was established to ensure effective enforcement of support orders, and that initiative was undertaken because of appreciation that court-ordered financial support is critical to individual well-being. The Family Responsibility Office should be working to find ways to make it more effective, not adopting policies that defeat its essential enterprise.

72 I am hopeful that both the Family Responsibility Office and the Ministry of Community and Social Services will reconsider their initial objections to my recommendations and do the right thing. "It's all in the name," and the instant question is whether it will be in the name of "fairness" or not.

Response to Recommendations

73 I sent a Revised Preliminary Report to the Family Responsibility Office, the Ministry and the Minister of Community and Social Services on July 21, 2006, setting out my findings and recommendations. In a brief response, the Minister stated that the Ministry takes the concerns I had identified very seriously, and assured me that a more detailed response would be sent by the Family Responsibility Office. The Family Responsibility Office responded on behalf of all parties on July 28, 2006. While the Family Responsibility Office referred to a number of initiatives it had recently undertaken to generally address service issues, it acknowledged that there is much to be done to ensure that the administration of the *Act* is applied fairly and consistently. The Family Responsibility Office also generally agreed that it has a responsibility to better inform its clients, and committed to taking steps to address my recommendations.

Compensation

74 The Family Responsibility Office noted that it is taking the opportunity to review all of its current policies and procedures as part of its "business transformation." In this context it agreed to compensate Mr. F in the amount of the arrears that would have been recoverable by the Family Responsibility Office at the time of the sale of the payor's property (**recommendation 1**).

Notification of Support Recipients

75 The Family Responsibility Office also commited to provide its clients, through a variety of communication vehicles, with information about what the Family Responsibility Office can do using Writs of Seizure and Sale (**recommendation 2**).

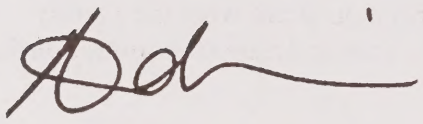
76 The Family Responsibility Office agreed in principle to advising support recipients that a support payor may be using a different name than the one recorded in the support order, that this could compromise the obtainment of an effective Writ of Seizure and Sale, and that an amended Court Order reflecting the name used by the payor and a new Writ may be required. However, it indicated that it would need to further investigate this recommendation by reviewing the provisions of the *Freedom of Information and Protection of Privacy Act*, as well as relevant decisions of the Information and Privacy Commissioner (**recommendation 3**).

Changes to legislation

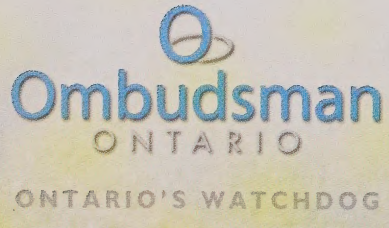
77 My fourth and fifth recommendations addressed legislative changes that I believe are necessary to ensure that the Family Responsibility Office has access to information about the names used by payors (**recommendation 4**), and to enable the Family Responsibility Office to enforce a Writ of Seizure and Sale against names used by the payor in addition to the name on the support order (**recommendation 5**). These legislative tools are necessary to complement and strengthen the Family Responsibility Office's current enforcement powers. The Family Responsibility Office advised that it would consider these suggested amendments and conduct an analysis of the proposed changes. It will then bring these suggestions forward to the Government when it next considers legislative amendments.

78 Finally, the Family Responsibility Office has undertaken to report back to my Office in six months on the action it takes to respond to my recommendations.

79 I am hopeful that the Family Responsibility Office's positive response to my recommendations signals a readiness on its part to embrace a more engaged and active approach to carrying out its duty of enforcement of support obligations. In the coming months, I will be monitoring the Office's progress in fulfilling the promise of a cultural change that will hopefully result in more effective support enforcement on behalf of Ontario's citizens.



André Marin
Ombudsman



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